NO. 87-592

In the Supreme Court of the United States

OCTOBER TERM, 1987

HARRY CONNICK,
District Attorney for the Parish of Orleans,
Petitioner,

versus

DONALD MAIRENA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RUSSELL STEGEMAN
STEGEMAN & MARRERO
425 Weyer
Gretna, LA 70053
(504) 368-0123

M. DAVID GELFAND*
TERRY E. ALLBRITTON
2322 Valmont St.
New Orleans, LA 70115
(504) 895-6252, 865-5995
Attorneys for Respondent
*Counsel of Record

QUESTIONS PRESENTED

I. Was The Fifth Circuit Correct In Ruling That A Local District Attorney Cannot Assert The Eleventh Amendment As A Defense For The Unconstitutional Acts Of His Office?

II. Did The Jury And Courts Below Act Reasonably In Finding Liability For The Callous And Reckless Formulation Of Policies Which Caused Due Process Violations?

III. Having Failed To Object At Trial, Can Petitioner Now Challenge A Proper Jury Charge Or The Jury's Reasonable Findings Of Fact?

IV. Should Certiorari Be Granted To Address An Alleged Conflict Within The Fifth Circuit When That Court Itself Found No Conflict?

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Treatises

Statutes

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

STATEMENT OF THE CASE

I. COURSE OF THE PROCEEDINGS IN THE COURTS BELOW

Plaintiff-Respondent Donald Mairena filed this action, under 42 U.S.C. §§1983, in the United States District Court for the Eastern District of Louisiana on July 2, 1985. The Complaint named as defendants: Harry Connick, District Attorney for the Parish of Orleans (Petitioner in this Court); Charles Foti, Criminal Sheriff for the Parish of Orleans; and Edwin Lombard, Clerk of Criminal District Court for the Parish of Orleans. Plaintiff sought monetary and other relief for violations of his rights under the Due Process Clause of the Fourteenth Amendment caused by defendants' unconstitutional procedures and policies. Specifically, the "gravamen of the complaint was that Mairena was wrongfully arrested, incarcerated and detained as a material witness at a time

when his testimony was no longer necessary, the relevant criminal case having been closed." Mairena v. Foti, 816 F.2d 1061, 1063 (5th Cir. 1987) (reprinted in Petition for Certiorari ["Pet. for Cert."] at A-5).

After the clerk and the sheriff negotiated settlements with Mr. Mairena, they were dismissed as defendants from the suit. Pursuant to stipulation of the parties, the case against Petitioner Connick was conducted as a jury trial before U.S. Magistrate Ronald Fonseca. (RECORD ["R."] Vol. 1, p. 56).

Petitioner Connick filed a motion to dismiss, which was denied by the court, without prejudice to reurge the motion after plaintiff's presentation of evidence at trial. R. Vol. 1, p. 58. On the second day of trial, February 14, 1986, Petitioner Connick made a motion for directed verdict. R. Vol. 3, p. 102. After hearing arguments and deliberating, Magistrate Fonseca denied

defendant's motion and set forth detailed reasons for his decision. R. Vol. 3, pp. 113-117. At the conclusion of the trial, the court charged the jury with the applicable law and gave them a verdict form containing specific Jury Interrogatories. R. Vol. 3, pp. 137-161. After the jury retired to consider their verdict, the trial court asked counsel for both sides if they had any objections to the Jury Charge or Jury Interrogatories. R. Vol. 3, p. 161. Counsel for Respondent Mairena presented various objections (R. Vol. 3, pp. 161-163), but counsel for Petitioner Connick had "no objection." R. Vol. 3, p. 164. See also Mairena, 816 F.2d at 1064-65 and n. 2 (Pet. for Cert. at A-8).

The jury returned a verdict awarding plaintiff $40,000 in damages. According to the Jury Interrogatories (R. Vol. 1, p. 220), they found that defendant Connick and

unnamed others had violated plaintiff's federal constitutional rights. In response to specific Jury Interrogatories, they apportioned the damages by allocating $30,000 of liability to Connick and $10,000 of liability to unnamed others. The trial court adopted the jury's verdict as the judgment of the court. R. Vol. 1, p. 245; Pet. for Cert. at A-12.[1]

Petitioner Connick later filed a motion for judgment notwithstanding the verdict on various grounds, none of which included the Eleventh Amendment. R. Vol. 2, pp. 253-54. At the hearing on this motion, in response to a specific inquiry by the trial court, Connick's counsel disavowed any Eleventh

---

1. The trial court later entered an order, under 42 U.S.C. §1988, against defendant Connick for plaintiff Mairena's attorney's fees and costs at trial. R. Vol. 2, p. 285.

Amendment defense in this case. After considering arguments on the various grounds which Connick did assert, the court denied his motion. R. Vol. 2, p. 279. On appeal, the Court of Appeals for the Fifth Circuit affirmed the jury's verdict and judgment of the trial court, in an opinion by Judge Jolly, Mairena v. Foti, 816 F.2d 1061 (5th Cir. 1987) (Pet. for Cert. at A-3 to A-11). Petitioner Connick then filed a petition for rehearing and a suggestion for rehearing en banc, as well as a supplemental application for en banc rehearing. All three applications were denied, without dissent. Pet. for Cert. at A-1, A-2. Petitioner Connick later filed his Petition to this Court.

II. STATEMENT OF THE FACTS

Instead of adopting the argumentative statement of facts presented by Petitioner, Respondent urges this Court to rely upon the facts as found by the Fifth Circuit, based upon uncontroverted evidence in the record, as presented to the trial court and the jury. See Mairena, 816 F.2d at 1062-63, 1065 (Pet. for Cert. at A-3 to A-5, A-9 to A-10). As the Fifth Circuit described them, the "facts in this case are like a bad dream: Donald Mairena, who had committed no crime, was arrested on an outstanding material witness warrant and, notwithstanding his pleas, thrown in jail for twenty-three days, although the case to which he was a witness had been closed months earlier when the defendant had pleaded guilty." Id. at 1062 (Pet. for Cert. at A-3). The underlying criminal case had been

closed fully eight and one-half months prior to Donald Mairena's arrest. Id. at 1063 (R. Vol. 4, pp. 10-12). The case was closed by the prosecuting assistant district attorney and administrative personnel pursuant to procedures established by that office, which included checking for the cancellation of outstanding appearance bonds and other matters, but excluded any check for outstanding material witness warrants. 816 F.2d at 1065 (R. Vol. 3, pp. 9, 47-48; R. Vol. 4, pp. 55-58). Furthermore, the "evidence supports a finding that the district attorney was himself involved in the failure to establish procedures for safeguarding the rights of material witnesses." Id. at 1065.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE ELEVENTH AMENDMENT DOES NOT SHIELD A LOCAL DISTRICT ATTORNEY'S OFFICE FROM LIABILITY FOR ITS UNCONSTITUTIONAL ACTS

A. The Eleventh Amendment Does Not Apply To Petitioner Because His Is A Local Government Office

A long line of cases clearly establishes that local government agencies do not have Eleventh Amendment immunity. That defense is available only to states and state agencies. See, e.g., Monell v. Department of Social Services, 436 U.S. 658, 690 n.54 (1978); Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 280 (1977); Lincoln County v. Luning, 133 U.S. 529, 530 (1890). See generally M. D. GELFAND, FEDERAL CONSTITUTIONAL LAW AND AMERICAN LOCAL GOVERNMENT 436-37 (1984). It is also well-established that a district attorney's office is a local government agency. See, e.g., Pembaur v. City of

Cincinnati, 106 S.Ct. 1292, 1296, 1300-01 (1986); Mairena, 816 F.2d at 1064 n. 1; Crane v. State of Texas, 766 F.2d 193, 195 (5th Cir.), cert. denied, 474 U.S. 1020 (1985). See also Gerstein v. Pugh, 420 U.S. 103, 106-07 (1975) (describing State Attorney for Dade County, Florida as a "county official" in a §1983 action).

All of the factors deemed crucial by this Court and lower courts demonstrate that Petitioner's office is a local government agency not entitled to Eleventh Amendment immunity from this federal constitutional suit. The Court of Appeals for the Fifth Circuit so ruled, 816 F.2d at 1064 n.1, and a petition for rehearing and application for en banc rehearing on this basis were unanimously rejected. This Court's

well-established precedents fully support those rulings.

Petitioner contends that he should be treated as a state official because his office is created by the Louisiana Constitution and his function is to enforce state law. See Pet. for Cert. 19, 21-22. This proposition is totally inadequate for several reasons. First, many other local government officials -- civil and criminal sheriffs, parish clerks of court, coroners, even parish and municipal councils -- are also created and have their duties set by the State Constitution. See La. Const. art. V, §§27-29; La. Const. art. VI, §§4-5. Clearly none of them qualify for Eleventh Amendment immunity. In addition, other local officers -- criminal sheriff, coroner, police -- also enforce state law and represent the

state. Indeed, this Court "has consistently refused to construe" the Eleventh Amendment to cover local governments and local officials, "even though such entities exercise a 'slice of state power'." Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979), citing, inter alia, Mt. Healthy and Lincoln County. Instead, the critical factors have always been the nature of the governmental office involved and the likely effect of the suit upon the state treasury. See, e.g., Lake Country Estates, 440 U.S. at 401; Crane, 766 F.2d at 194-95; R. ROTUNDA, J. NOWAK & N.J. YOUNG, 1 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 86-87 (1986).

District Attorney Connick's office is local in nature. He is a locally elected official, chosen only by the

voters in a single Louisiana parish -- Orleans (coterminous with the City of New Orleans).[2] Moreover, Louisiana law consistently treats district attorneys as parish officials rather than as officials of the State or one of its agencies. This is true of the very article of the State Constitution cited by Petitioner. See La. Const. art. VI, §§5(G), 7(B) (describing district attorney as "parish official"). Similarly, Louisiana statutes dealing with every conceivable subject--filling vacancies (see footnote 2), ethics, furnishing reports, budget and finance (discussed below)--all treat the

---

2. A vacancy in the office could be filled by the New Orleans City Council, until an election is held. La. Const. art. V, §30; La. Rev. Stat. Ann. §18:602 (West Supp. 1987).

district attorney as a local government official. See, e.g., La. Rev. Stat. Ann. §§18:602(C), 39:1302(1), 39:1527(1) (West Supp. 1987); id. §§42:290(B)(West 1965); id. §42:1102(2)(f)(West Supp. 1987); id. §§42:1441-:1441.2(A) (West Supp. 1987).

Petitioner seeks to overcome this great weight of state constitutional and statutory law by citing dicta from plurality opinions in two Louisiana state court cases--Diaz v. Allstate Ins. Co., 433 So.2d 699, 701 (La. 1983), and City of New Orleans v. State, 426 So.2d 1318 (La. 1983).

The City of New Orleans case involved various state statutes requiring the City to pay portions of the salaries of some employees of various separately elected officials (e.g. district attorney, criminal sheriff, coroner). Because the statutes

involved predated the 1974 State Constitution, the Louisiana Supreme Court rejected the contention by the City of New Orleans that these statutes violated the City's constitutional home rule protection. Given this factual pattern, it is not surprising that neither the plurality nor other opinions in the case even considered state financial liability for civil rights violations committed by a district attorney. Indeed, if that case is relevant at all, it actually provides further support for Respondent's position that the local district attorney receives most of his funds from local, not state, government sources. See note 4 infra and accompanying text.

Though the facts of Diaz are somewhat more relevant, close examinations of the opinion and subsequent statutory developments reveal

that Diaz provides no real support for Petitioner's novel position. First, the Diaz court was interpreting a statute that dealt with State indemnification of officers and employees found personally liable for negligent torts. The plurality opinion quoted by Petitioner in no way considered state liability for a judgment against a governmental entity. Hence, Diaz could, at most, apply to limited aspects of a personal capacity civil rights suit.

Furthermore, the Louisiana statute interpreted in Diaz--La. Rev. Stat. Ann. §§13:5108.2 -- was specifically amended in 1984 so as to deny indemnification for "the parish officials set forth and named in Article VI, Sections 5(G) and 7(B) of the Constitution of Louisiana." Id. §§13:5108.2 (West Supp. 1987). Since the district attorney is "named" as a parish official in both §§5(G) and §§7(B)

of Article VI, it is clear that the Louisiana Legislature specifically overruled Diaz on the very point Petitioner now asserts.[3]

Noticeably absent from Petitioner's Eleventh Amendment discussion is any mention of the most crucial factor--the financing of his office. Louisiana law provides that parishes are the source of general funds for the operation of district attorneys' offices. See La. Rev. Stat. Ann. §§16:6, 16:71(D) (West 1982). Indeed, analysis of Petitioner Connick's budget reveals that the funds for the District Attorney's Office are

---

3. Petitioner called both City of New Orleans and Diaz to the attention of the Fifth Circuit panel, in oral argument, and to the whole court in his supplemental application for rehearing en banc. Yet, the Court of Appeals rejected his Eleventh Amendment argument. This Court has "generally accord[ed] great deference to the interpretation and application of state law by the courts of appeals." Pembaur, 106 S.Ct. at 1301 n. 13.

derived primarily from the City of New Orleans, secondarily from local fines and forfeitures, and only in small part from the State of Louisiana.[4] The level of state government financing has long been much lower than that for the school board

---

4. Relevant budget figures reflect a fairly steady increase in City funding of the District Attorney's office from $1,313,641 for fiscal year 1982, to $1,989,679 for fiscal 1987, with a recommended level of $2,052,607 for fiscal 1988. In this same period, state funding, which was already lower, declined dramatically -- from $550,000 in fiscal year 1982-83 to $87,502 in fiscal 1985-86 and $0 in fiscal 1986-87). See City of New Orleans, Recommended Budget, Fiscal 1988, at S-12 to S-14; City of New Orleans, Operating Budget for Calendar and Fiscal Year 1986 (Decision Units 8100-8101); District Attorney's ZBB Request for 1988 Budget.

Not included are State funds for salary reimbursements ($131,701 in 1984 and $151,043 for 1987). See District Attorney of Orleans Parish, Annual Financial Statements for 1984 and 1987. These dedicated salary funds are not available to satisfy judgments against the District Attorney's Office. See La. Rev. Stat. Ann. §§16:10-11, 39:1304(C)(2), 42:1441(A), 42:1441.1, 42:1441.1, 42:1441.2(A) :1441.2(A) (West Supp. 1987).

in Mt. Healthy, where this Court found no Eleventh Amendment bar, despite "significant" state financial contributions. See also Crane v. State of Texas 766 F.2d at 193, 195 (5th Cir.), cert. denied, 474 U.S. 1020 (1985) (partial state reimbursement treated as insufficient).

Even more telling for Eleventh Amendment purposes, Louisiana law specifically provides:

> The state of Louisiana shall not be liable for any damage caused by a district attorney, coroner, assessor, sheriff, clerk of court, or public officer of a political subdivision within the course and scope of his official duties, or damage caused by an employee of a district attorney, coroner, assessor, sheriff, clerk of court, or public officer of a political subdivision.

La. Rev. Stat. Ann. §42:1441(A)(West Supp. 1986)(emphasis added). This clear

and explicit prohibition of state liability for any damages assessed against district attorneys has been reaffirmed and reinforced by subsequent legislation. See La. Rev. Stat. Ann. §42:1441.2(A) (West Supp. 1987) (provisions imposing respondeat superior liability "shall not impose liability upon the state for the offenses and quasi-offenses of any of those public officers named in and designated as parish officials in Article VI, Section 5(G) and 7(B) of the Constitution," which lists "district attorney" as a parish official); La. Rev. Stat. Ann. §13:5108.2(A)(2)(West Supp. 1987)(state indemnification of its officials, similarly excluding district attorneys and other parish officials).[5]

---

5. See also La. Rev. Stat. Ann. §42:1441.1 (West Supp. 1987) (state liability only for persons "expressly specified" to be state officials, and

Because only those judgments which "require payment of state funds are barred by the Eleventh Amendment," Quern v. Jordan, 440 U.S. 332, 337-38 n.6 (1979), the small jury verdict in this case cannot possibly be barred. See also Edelman v. Jordan, 415 U.S. 651, 668 (1974). Far from requiring payment from the state treasury, Louisiana law (as detailed above) expressly, and repeatedly, prohibits State payment of such a damage award. See Moor v. County of Alameda, 411 U.S. 693, 719 (1973) (state statute making counties liable

---

(footnote 5 continued)

district attorneys not so specified); La. Rev. Stat. Ann. §39:1527(1)(West Supp. 1987) (Public Finance: excluding "parish officials," such as district attorneys, from liability insurance program for "state agencies"); La. Rev. Stat. Ann §39:1302(1) (West Supp. 1987) (Local Government Budget Act, which defines "political subdivision" to include "independently elected parish offices, including the office of. . .district attorney").

for judgments against them precluded Eleventh Amendment defense); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 402 (1979) (similar provisions as to planning agency).

In short, all of the crucial electoral, jurisdictional, and financial factors definitively point to one simple conclusion--the Office of the "District Attorney for Orleans Parish" is a local government agency not entitled to an Eleventh Amendment defense for its unconstitutional policies.[6]

---

6. Petitioner's reliance upon Imbler v. Pachtman, 424 U.S. 409 (1976) is similarly misplaced. Imbler deals only with claims against a prosecutor in his personal capacity. This Court has regularly explained the distinction between such a personal defense and an institutional defense (such as the Eleventh Amendment). See, e.g., Owen v. City of Independence, 445 U.S. 622, 638, 655-57 (1980); Lake Country Estates, 440 U.S. at 401-05.

Furthermore, any personal capacity aspects of this suit would not concern discretionary prosecutorial actions, i.e. the authority of the district

B. Petitioner Cannot Now Assert An Eleventh Amendment Defense

Even if this Court were willing to overrule the great weight of this state and federal law demonstrating that the Orleans Parish District Attorney's Office is a local government entity that is outside the scope of the Eleventh Amendment, Petitioner cannot now assert an Eleventh Amendment defense in this case, as he has waived such a defense and consented to suit. The same "prudential objection to reversing a judgment" which guided the court last Term in City of Springfield v. Kibbe, 107 S.Ct. 1114, 1116 (1987) (per curiam), should also apply to this waiver.

(footnote 6 continued)

attorney to issue material witness warrants is not challenged. Instead, only policies involving purely administrative, post-prosecutorial activities are challenged. See Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 734-35 (1980); Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980).

Petitioner specifically waived any Eleventh Amendment defense to this suit. The defense does not appear in Petitioner Connick's answer (R. Vol. 1, p. 204), and it was not asserted as a basis for his motion to dismiss (R. Vol. 1, p. 31), or his motion for judgment n.o.v. (R. Vol. 2, pp. 253-54). In addition to these acts of abandonment, Petitioner Connick's counsel--all of whom are legally knowledgeable members of the Louisiana Attorney General's Office--took affirmative steps which constituted direct consent to suit and waiver of the defense. Prior to trial, Connick's counsel cited the absence of a sovereign immunity defense from the case as the principal rationale for quashing the subpoena duces tecum (directed to Mr. Connick and the budget of the

District Attorney's Office). See Toll v. Moreno, 458 U.S. 1, 18 (1982); Vargas v. Trainor, 508 F.2d 485, 492 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975)("A representation made in a judicial proceeding for the purpose of inducing the court to act or refrain from acting satisfies the requirements stated in Edelman.").

Furthermore, at the hearing on Connick's motion for judgment notwithstanding the verdict, his counsel--then a Deputy Attorney General --specifically disavowed and waived any Eleventh Amendment defense when directly questioned on this point by the trial court. See id; Richardson v. Fajarado Sugar Co., 241 U.S. 44, 47 (1915); Porto Rico v. Ramos, 232 U.S. 627, 631 (1914). See also Clark v. Barnard, 108 U.S. 436, 447-48 (1883); Vecchione v. Wohlgemuth, 558 F.2d 150, 156-57 (3d Cir. 1977).

Petitioner attempted to resuscitate the defense in his brief to the Fifth Circuit. That court dealt with the claim and rightly rejected it. 816 F.2d at 1064 n.1.

Finally, Petitioner cannot now be heard to assert that the Eleventh Amendment is a quasi-jurisdictional bar, allowing him to recant his affirmative waiver and revive the defense. Petitioner in the instant case, Orleans Parish District Attorney Harry Connick, was also the petitioner in Connick v. Myers, 461 U.S. 137 (1983).[7] This Court

---

7. In Myers, the Eleventh Amendment was presented as a defense in Connick's petition for a writ of certiorari. See 50 U.S.L.W. 3571, 3674 (1981). The general grant of certiorari in no way excluded the Eleventh Amendment issue, 455 U.S. 999 (1982), and the issue was fully briefed by both sides. See Brief for Petitioner at i and 15-17, Connick v. Myers (No. 81-1251); id., Brief for Respondent at i and 34-41, id., Supplemental Brief for Petitioner; id., Supplemental Brief for Respondent.

ruled on the merits in Myers, thereby effectively rejecting any contention that the Eleventh Amendment was a quasi-jurisdictional bar to suit against this very Petitioner.

For all of these reasons, Respondent urges this Court to decline Petitioner's invitation to overrule your well-established Eleventh Amendment precedents solely to shield a local district attorney's office from liability for its unconstitutional acts.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT THE EVIDENCE IN THE RECORD SUPPORTED THE JURY'S VERDICT WITH SPECIAL INTERROGATORIES BASED UPON A PROPER JURY CHARGE

Petitioner asserts that the Court of Appeals for the Fifth Circuit erroneously upheld a jury verdict with special interrogatories which found him liable under 42 U.S.C. §§1983. Such a contention must be premised either upon

the jury allegedly receiving incorrect instructions from the trial court or upon alleged insufficiency of evidence to support the verdict. See Mairena v. Foti, 816 F.2d 1061, 1064-65 (5th Cir. 1987) (Pet. for Cert. at A-7 to A-8). Neither is applicable in this case.

Nor is this a case in which the finding of liability has been muddied by inconsistent jury verdicts. See Praprotnik v. City of St. Louis, 798 F.2d 1168, 1172 n.3 (8th Cir. 1986), argued, 56 U.S.L.W. 3286 (Oct. 20, 1987) (No. 86-772). The jury in the instant case was correctly charged by the trial court, based up this Court's opinions. The instructions provided, inter alia, that liability could attach only if "the failure of Harry Connick to establish such a procedure was deliberate, or the result of callous indifference. Mere negligence ... is insufficient ...." R.

Vol. 3, p. 147.[8] Based upon these instructions, the jury weighed the evidence and arrived at a reasonable verdict, explained by their responses to special interrogatories.[9] Furthermore, Petitioner is estopped to raise objections to the jury verdict as he neither objected to the jury charge nor moved for a new trial. See part III, below.

---

8. The court added that "to find defendant Harry Connick liable, you must find that he actually participated in the event complained of ...." R. Vol. 3, p. 149. Respondent Mairena objected to this portion of the jury charge as being too restrictive. See R. Vol. 3, pp. 162-63; see also footnote 11, infra.

9. The jury acted very reasonably in apportioning the damages among defendants responsible for Respondent Mairena's unconstitutional detention for 23 days. Petitioner Connick was held liable for only $30,000. Pet. for Cert. at A-5, A-6, A-12.

A. The Jury Properly Found That There Was An Affirmative Policy Not To Clear Outstanding Material Witness Warrants

This case does not concern simply the failure to adopt a proper policy. Instead, it involves the callous and reckless establishment and adoption, by Petitioner himself and by his subordinates (to whom he delegated authority), of an affirmative, consistent policy of not clearing outstanding material witness warrants before closing a criminal case. As the jury found, Petitioner Connick callously and recklessly crafted a policy pursuant to which his subordinates would not check whether a material witness warrant was outstanding before closing a case. See Mairena, 816 F.2d at 1065 (Pet. for Cert. at A-10). See also Wanger v. Bonner, 621 F.2d 675, 679-80 (5th Cir. (1980)(imposing liability upon sheriff

for his policy that deputies would not verify addresses before serving out-of-county arrest warrants).

Ray Comstock, long-time associate of Petitioner Connick, testified at trial that Petitioner and he did not include a check for the existence of outstanding material witness warrants when they formulated the policy for closing cases, even though he agreed that such a check was needed. Mairena, 816 F.2d at 1065 (Pet. for Cert. at A-9 to A-10). Furthermore, Clifford Strider, Chief of Trials in the District Attorney's Office, testified that there should be a policy of checking for outstanding warrants in light of the deprivations of liberty which can result from failure to cancel. See R. Vol. 4, pp. 63, 70-72. The jury could properly find, and the Court of Appeals could properly uphold a finding, that this

testimony, along with other evidence, supported the verdict of liability against Petitioner for callous and reckless indifference to Respondent's Constitutional rights.

As the testimony at trial firmly established that a formal process was followed by Petitioner in crafting the policy to be followed in closing cases, this case is far-removed from one in which there may be a question as to whether the appropriate official has adopted a particular policy. See, e.g., Pembaur v. City of Cincinnati, 106 S.Ct. 1292, 1299 (1986); Praprotnik, 798 F.2d at 1173-1175 (8th Cir. 1986), argued, 56 U.S.L.W. 3286 (Oct. 20, 1987) (No. 86-772).

B. The Jury Properly Found That Respondent's Incarceration Was Not A Single, Isolated Incident

Petitioner asserts that the Fifth Circuit's decision in this case conflicts with City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). In this argument, however, Petitioner misinterprets that case. A governmental policy becomes effective when adopted, and applies the first (and each) time it is followed. In Tuttle, both the plurality and the concurring opinions recognized that a single discrete act implementing an unconstitutional policy can be sufficient to establish liability under §1983. As Justice Rehnquist noted: "[o]bviously, it requires only one application of a policy ... to satisfy fully Monell's requirement." Tuttle, 471 U.S. at 822 (plurality). See id. at 832 (Brennan, J.,

concurring). See also Owen v. City of Independence, 445 U.S. 622 (1980)(imposing liability for a single act denying procedural due process).

Furthermore, Tuttle's holding -- that a single incident by a lower echelon police officer acting on his own is insufficient to establish municipal liability -- has no application to the instant case, in which the elected, policymaking official was found liable for his own callous and reckless disregard. See Pembaur, 106 S.Ct. at 1299-1300 n.11 ("the policy which ordered or authorized an unconstitutional act can be established by a single decision by proper municipal policymakers"); id. at 1309 n.6 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.)("[t]he local government unit may be liable for the first application of a duly constituted

unconstitutional policy").[10]

Petitioner claims that Donald Mairena's incarceration was "an isolated incident" and, therefore, cannot serve as the basis for Petitioner's liability. Pet. for Cert. at 13. Petitioner then attempts to explain away yet another incident (of which his office was aware, see R. Vol. 4, pp. 70, 103-04, 106) as "inapposite." Pet. for Cert. at 13. In fact, Linday Howard was jailed on a grand jury material witness warrant so that she would be available to testify before the grand jury. See Exhibit P-2; R. Vol. 3, pp. 62-64, 98. However, she was not arrested until after the grand jury had been disbanded. Thus, like

---

10. Justice Stevens' concurrence reiterated his view that respondeat superior alone should be a valid basis for municipal liability. See Pembaur, 106 S.Ct. at 1303.

Respondent Mairena, she was arrested only after the hearing for which she was sought had terminated. She was imprisoned for 11 months and was able to obtain her release only by filing a pro se petition for a writ of habeas corpus. See Exhibit P-2; R. Vol. 3, pp. 62-64, 98. Petitioner now claims, for the first time in this litigation, that Ms. Howard was "deliberately held so she could testify at the subsequent trial." Pet. for Cert. at 13. This new assertion runs completely contrary to the unrebutted testimony at trial and to the fact that it was a grand jury material witness warrant upon which she was arrested rather than a trial witness warrant. Thus, Mairena's situation was not an isolated incident. See, e.g., Gerstein v. Pugh, 420 U.S. 103, 106 (1975) (not allowing even a suspect to "be detained for a substantial period

solely on the decision of a prosecutor").

Petitioner's contention that he should not be liable for unconstitutional acts, such as those which injured Respondent Mairena and at least one other person, would produce absurd results. A local government and its officials would then be entitled to one or, as proven below, two "free" violations of citizen's constitutional rights. Indeed, this Court has repeatedly rejected Petitioner's erroneous "first bite" theory of §1983 litigation. See, e.g., Pembaur, 106 S.Ct. at 1298-99; Tuttle, 471 U.S. at 822; Owen v. City of Independence, 445 U.S. 622 (1980).

C. The Jury Properly Found That The Violation Of Respondent's Constitutional Rights Was Caused By Petitioner's Policy

Respondent Donald Mairena was unconstitutionally incarcerated as a direct result of Petitioner's callously and recklessly formulated policy. The Congressional prohibition against "subject[ing] or caus[ing] to be subjected" to a deprivation of federal rights squarely encompasses this case. See 42 U.S.C. §1983 (1982). There can be no doubt that the policy for closing cases, as callously crafted by Petitioner, was the "moving force" behind Respondent's unconstitutional jailing. See Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978). This is not a case where "any number of other factors were also in operation that were equally likely to contribute or play a predominant part in bringing

about the constitutional injury." City of Springfield v. Kibbe, 107 S.Ct. 1114, 1120 (1987) (O'Connor, J., dissenting). Donald Mairena was incarcerated on a material witness warrant 8 1/2 months after the underlying criminal case had been closed. But for Harry Connick's reckless policy, that incarceration would not have occurred.

III. HAVING FAILED TO OBJECT AT TRIAL, PETITIONER CANNOT NOW CLAIM THAT THE JURY INSTRUCTIONS OR FINDINGS WERE INCORRECT

A party cannot "assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict." Fed. R. Civ. P. 51. As noted by the Fifth Circuit, Petitioner Connick failed to object to the proposed jury instructions regarding the standard by which §1983 liability could be imposed.

Mairena, 816 F.2d at 1064 (Pet. for Cert. at A-8).[11] Therefore, the instant case is governed by the rule reaffirmed only last Term in Kibbe. Like the petitioner in Kibbe, Harry Connick failed to object to jury instructions on §1983 liability. As a result of that petitioner's failure to preserve this issue, the Kibbe Court dismissed the writ of certiorari as improvidently granted. 107 S.Ct. at 1116. The same well-established principle governs here. See Mairena, 816 F.2d at 1064 n.2.

Even if this Court were to disregard the "considerable prudential objection" which required dismissal of the suit in Kibbe, see id., Petitioner would gain nothing. The instruction

---

11. Respondent Mairena, on the other hand, did object to the instructions, as they seemed to impose too high a burden upon plaintiff. See Mairena, 816 F.2d at 1064 n.2 (Pet. for Cert. at A-8); footnote 8, supra.

actually given at the trial below specified that liability could be found only where the policy "was deliberate, or the result of callous indifference." R. Vol. 3, p. 147. This charge is almost identical to the standard approved by the Kibbe dissenters: that liability should lie only where the policy "amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city's domain." 107 S.Ct at 1121 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and White and Powell, JJ.).

If this Court were to grant certiorari, reverse the Fifth Circuit, and remand for a new trial (for which Petitioner never moved), any instruction would be virtually identical to the one already given to the jury below (in February 1986). The same, or quite similar, evidence would again be

presented at trial. And, once again, a reasonable jury could easily find the same liability on the part of Petitioner Connick as did the jury below. That jury did not run amok; they awarded a modest amount of damages--$30,000--for the "grievous wrong done to Mairena," who was never a suspect, for his 23 days of confinement. Mairena, 816 F.2d at 1064 n.2 (Pet. for Cert. at A-8 n.2). Cf. Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships"). Such protracted proceedings would be a waste of the limited judicial resources of this Court, the Court of Appeals, and the trial court, and would accomplish little, if anything.

IV. PETITIONER'S ASSERTION THAT THE DECISION IN THIS CASE CONFLICTS WITH OTHER FIFTH CIRCUIT DECISIONS IS NEITHER CORRECT NOR IS IT A BASIS FOR GRANTING CERTIORARI HERE

Petitioner Connick maintains that the Fifth Circuit decision which he seeks to bring before this Court "conflicts with the decisional law of the Fifth Circuit." Pet. for Cert. at 14, 18. In fact, the decision in the instant case is even more generous to Petitioner Connick than decisions of other Courts of Appeals, including the Fifth Circuit, have been to §1983 defendants. See, e.g., Harris v. City of Pagedale, 821 F.2d 499 (8th Cir. 1987) (post-Pembaur liability for deliberate indifference); Williams v. Butler, 802 F.2d 296 (8th Cir. 1986) (en banc) (same for overdelegation of final authority), pet. for cert. filed, 55 U.S.L.W. 3476 (Jan. 13, 1987) (No. 86-1049); Kibbe v. City of Springfield,

777 F.2d 801 (1st Cir. 1985) (liability for gross negligence), cert. dismissed as improvidently granted, 107 S.Ct. 1114 (1987); Marchese v. Lucas, 758 F.2d 181 (6th Cir. 1985) (liability for failure to train and discipline), cert. denied, 107 S.Ct. 1369 (1987); Lozano v. Smith, 718 F.2d 756 (5th Cir. 1983); (liability for failure to supervise). Moreover, even an actual inconsistency in the "decisional law" of a Court of Appeals would rarely be a ground for the exercise of this Court's discretionary jurisdiction.

There is no conflict within the Fifth Circuit. In Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984) Judge

Garwood's[12] opinion held that there must be "gross negligence amounting to conscious indifference" before liability can attach. 717 F.2d at 227. This standard is nearly identical to the actual jury charge in the instant case, see Mairena, 816 F.2d at 1065 (Pet. for Cert. at A-9), a charge to which Petitioner failed to object at trial. See Mairena, 816 F.2d at 1064 n.2. (Pet. for Cert. at A-8).

Nor does the instant case conflict with Crane v. State of Texas, 759 F.2d 412, reh'g denied, 766 F.2d 195 (5th Cir.) cert. denied, 474 U.S. 1020 (1985). In Crane, the Fifth Circuit

---

12. Judge Garwood noted his dissent from the panel's decision below, but he did not point to any inconsistency with his Languirand opinion. Furthermore, Judge Garwood neither dissented from the denial of the petition for rehearing, nor requested that the Fifth Circuit be polled on rehearing en banc in the instant case.

panel found that a District Attorney's "choice of an unsound and legally insufficient system [regarding misdemeanor capias warrants] represents County policy." Crane, 759 F.2d at 430. Indeed, the decision below cited Crane with approval. Mairena, 816 F.2d at 1064 n.1. (Pet. for Cert. at A-6).

No conflict in the Fifth Circuit has been found by the court in the best position to detect any conflict--the en banc Fifth Circuit. No Judge on the Fifth Circuit requested polling for a rehearing en banc; no Judge has found the inconsistency with long-standing Fifth Circuit precedent claimed by Petitioner. See, e.g., Ramie v. City of Hedwig Village, 765 F.2d 490, 493 (5th Cir. 1985)(dicta regarding isolated incidents by individual police officers), reh'g denied, 770 F.2d 1081, cert. denied, 474 U.S. 1062 (1986);

Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984), cert. denied, 472 U.S. 1016 (1985)(policymaking authority obtained "by virtue of the office to which that officer is elected"); Vela v. White, 703 F.2d 147, 154 (5th Cir. 1983)(no liability because evidence indicated that chief of police "took steps to improve the recording and analysis of information ... pertaining to the disposition of complaints") (emphasis added); Wanger v. Bonner, 621 F.2d 675, 679 (5th Cir. 1980)(imposing liability upon sheriff for actions of deputies taken "pursuant to policies implemented by Sheriff").

Furthermore, even if there were an actual inconsistency within the Circuit, that generally would not be a basis for granting certiorari. See Sup. Ct. R. 17.1(a), (c). In limited instances, none of which apply here, this Court

has remarked on intracircuit splits when granting certiorari.[13] The general rule against such a grant is stated by Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam), which dismissed a certified question specifically requesting this Court to resolve a split within a circuit:

> [D]oubt about the respect to be accorded to a previous decision of a different panel should not be the occasion for invoking so exceptional a

---

13. There seem to be three such instances. First, where an intracircuit split coincides with a split among the circuits, see, e.g., Scarborough v. United States, 431 U.S. 563, 567 (1976); Commissioner v. Estate of Bosch, 387 U.S. 456, 457 (1966). Second, where a circuit panel comments on the intracircuit split and on the undesirability of the holding it feels bound to follow, see, e.g., Dickinson v. Petroleum Corp., 338 U.S. 507, 508 (1950); Maggio v. Zeitz, 333 U.S. 56, 59, 70, 77 (1948). Third, where an important issue independently supports certiorari supervision, see, e.g., Davis v. United States, 417 U.S. 333, 340-41 (1974); John Hancock Life Ins. Co. v. Bartels, 308 U.S. 180, 181 (1939).

> jurisdiction of this Court as that on certification. It is primarily the task of a Court of Appeals to reconcile its internal difficulties.

Id. (emphasis added).

The Fifth Circuit follows the general rule that one panel of the court will not overrule another panel unless intervening binding authority requires the panel to decide differently. See, e.g., White v. Estelle, 720 F.2d 415, 417 (5th Cir. 1983). A panel can be overruled only by the court sitting en banc. Further, even if the Mairena decision below were deemed to create a split within the circuit, the Fifth Circuit has adopted a rule to govern that situation.[14]

---

14. Whenever two panels of the court arrive at inconsistent decisions, the inconsistency is resolved in favor of the earlier decision. See, e.g., United States v. Gray, 751 F.2d 733, 735 (5th Cir. 1985); Odell v. North River Ins. Co., 614 F. Supp. 1556 (W.D. La. 1985).

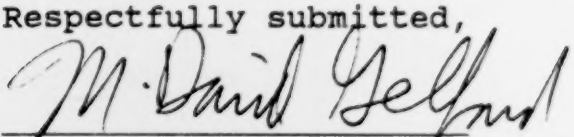
Thus, an intracircuit split is selfhealing -- it does not require application of the limited resources of this Court.

CONCLUSION

Respondent Donald Mairena's constitutional rights were violated by his being held 23 days on an outdated material witness warrant. Mairena's incarceration was directly caused by the policy crafted by District Attorney Harry Connick. Petitioner Connick simply did not think it worthwhile, when his office closed cases, to determine whether any persons would be arrested and languish in jail months later -- persons who had committed no crimes, who were not suspected of criminal activity, and who were no longer needed by Petitioner in his criminal prosecutions.

For these reasons, Respondent Mairena urges this Court to deny the petition.

Respectfully submitted,

By 

M. DAVID GELFAND
2322 Valmont Street
New Orleans, LA 70115
(504) 865-5995, 895-6252

Counsel of Record for
Respondent

TERRY E. ALLBRITTON, of
Counsel

The assistance provided by Andrew C. Simpson, and Rebecca King is gratefully acknowledged.